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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 5 - 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 96-240
Table of Allotments) RM-8946
FM Broadcast Stations.) RM-9010
(Lockport and Amherst, New York))

TO: John A. Karousos, Chief
Allocations Branch, Policy and Rules Division
Mass Media Bureau

PETITION FOR RECONSIDERATION

1. Culver Communications Corp. ("Culver") hereby seeks reconsideration of the Report and Order ("R&O"), DA 97-2485, released December 5, 1997, by the Chief, Allocations Branch, in the above-captioned matter. As set forth below, the R&O is without adequate factual basis and is inconsistent with Commission precedent.

2. By way of background, this proceeding was initiated by Culver, which sought the allotment of Channel 221A to Lockport, New York. The Commission issued a Notice of Proposed Rule Making ("NPRM"), 11 FCC Rcd 20514 (1996), in response to Culver's proposal. Culver filed comments supporting the proposal. The only other submission responsive to the NPRM was a terse "Counterproposal" filed by Kevin O'Kane ("O'Kane"), who proposed the allotment of Channel 221A to Amherst, New York.

3. Culver filed timely reply comments and a separate reply to O'Kane's Counterproposal, in both of which Culver set forth substantial technical, demographic and other information

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establishing the preferability of the Lockport proposal. By contrast, O'Kane's minimalist Counterproposal included bare recitation of little more than two population statistics.^{1/} O'Kane did not file any reply comments.

4. In the R&O, the Commission acknowledged that allotment of the channel to Lockport would result in a fifth reception service to 2,679 persons. Claiming that its comparison "considered such factors as population, location and reception services", the Commission concluded that Amherst was to be preferred because Amherst is bigger than Lockport, Amherst is "presently without any local transmission service at night", and a "vastly larger number of persons . . . would receive a new service from the Amherst station." R&O at ¶7. But that rationale is neither rational nor consistent with precedent.

5. As Culver demonstrated in its submissions, Amherst is a part of the Buffalo Urbanized Area. Because of that fact, and absent a contrary showing by the Amherst proponent (in this case, O'Kane), the Commission generally presumes that the proposed

^{1/} O'Kane's Counterproposal consisted of one page of text (plus two lines on a second page), including caption. The only demographic or other non-technical matter which might be construed as relating to the resolution of the Lockport/Amherst mutual exclusivity was as follows:

Amherst, New York, in Erie County, is a community with a population of 106,157 (1990 Census). It also has only one daytime-only AM radio station. Thus, the proposed FM station on Channel 221A would be the first full-time transmission service for Amherst.

It is noted that Lockport, with a population of 24,426 already has a full-time radio station and does not need a second station as badly as Amherst needs a full-time station.

community of license would not be Amherst alone, but rather would be the entire Buffalo Urbanized Area. See, e.g., Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951); Beaufort County Broadcasting Co. v. FCC, 787 F.2d 645 (D.C. Cir. 1986); Modification of FM and TV Authorizations, 5 FCC Rcd 7094, n. 14 (1990); Amendment of Section 73.202(b) (Clovis and Madera, California), 11 FCC Rcd 5219, 5223, ¶17 (Allocations Branch 1996). ^{2/}

6. Since there are at least some 20 stations already licensed to Buffalo or other communities in the Buffalo Urbanized Area ^{3/}, it is clear that that area is dramatically well-served. By contrast, Lockport is not in an urbanized area, and has only

^{2/} Culver recognizes that the Commission has, on occasion, suggested that the policy of Huntington and related cases is applicable to an inordinately narrow class of cases involving proposals to change the community of license of an existing station in which proposals the proponent of the change seeks a first local service preference. See, e.g., Amendment of Section 73.202(b) (Remington and Falmouth, Virginia), 8 FCC Rcd 6627, n.5 (Allocations Branch, 1993). But no basis exists for such an unduly narrow reading of the reach of Section 307(b). Indeed, to the extent that, even in that narrow class of cases, the Commission routinely requires proponents of channel allotments in Urbanized Areas to make an additional showing to satisfy the Commission concerning the propriety of such an allotment, e.g., Clovis and Madera, California, supra, no basis at all exists for not requiring at least the same showing in situations such as the instant one, where the supposed service attributes of an Urbanized Area allotment proposal have, without such an additional showing, been deemed to justify denial of an allotment to a non-Urbanized Area which includes underserved population. Since no such additional showing was tended in the instant case, the Commission has no basis on which to conclude that the Amherst proposal is preferable to the Lockport proposal.

^{3/} According to the 1997 edition of the Broadcasting and Cable Yearbook, there are 18 radio stations (AM or FM, commercial or noncommercial) licensed to Buffalo, and an additional two stations licensed to communities (Depew and Cheektowaga) in the Buffalo Urbanized Area.

one local AM station licensed to it. Further, as set forth in Culver's reply comments, where the service which would be delivered by the O'Kane proposal would be completely overlapped by no fewer than 15 other signals, Culver's proposed service would be partially overlapped by only four other signals. Indeed, Culver's proposal would provide a fifth new service to 2,679 persons.

7. The "rationale" articulated in the R&O appears to be based on two separate premises: first, that "Amherst . . . is presently without any local transmission service at night" and, second, that Amherst is bigger than Lockport (as a result of which an Amherst station would reach a larger number of people). See R&O at ¶7. The trouble with the first premise is obvious. As discussed above, since Amherst is within the Buffalo Urbanized Area, all the stations already licensed to that area are deemed to be effectively local to Amherst, absent some contrary showing by the proponent. Since O'Kane made no such showing, it must be concluded that, contrary to the glib statement in the R&O, Amherst enjoys the equivalent of multiple local nighttime transmission services. Thus, the R&O's claim that Amherst is without any local transmission service at night is not valid. ^{4/}

8. The second premise is equally flawed, as it is inconsistent with the basic statutory requirement that broadcast channels be allocated among communities in a fair, efficient and

^{4/} It should also be noted that the R&O's first premise seems in any event inconsistent with the R&O's prefatory statement, Paragraph 6, that questions of local transmission service are not applicable to this proceeding.

equitable manner. See 47 U.S.C. §307(b). That statutory mandate requires the Commission to scrutinize carefully proposals which, while purportedly bringing new service to relatively small and arguably underserved communities, would merely result in new stations in already well-served Urbanized Areas. See, e.g., Modification of FM and TV Authorizations, 5 FCC Rcd 7094, 7096, ¶¶12, 13 (1990). In such cases, even though the raw audience numbers may be impressive, it may be contrary to the dictates of Section 307(b) to allot additional channels to already well-served Urbanized Areas, particularly where such allotments would deprive other smaller, less-well-served communities of their own allotments. See, e.g., Amendment of Section 73.202(b) (Clovis and Madera, California), 6 FCC Rcd 5071, ¶3 (Allocations Branch 1991). In other words, as the Commission itself has recognized, when it comes to the potential audiences, size does not necessarily matter.

9. So, in the instant case, the admittedly larger size of the prospective Amherst audience should not matter at all, since Amherst is located within the Buffalo Urbanized Area and the larger audience is therefore already well-served with the multitude of stations already licensed to that area. By contrast, Lockport is not a part of any Urbanized Area, it has only one local transmission service, and it has, at most, only five reception services (as opposed to Amherst's 20 local-to-the-Urbanized-Area stations and its approximately 15 reception services). Moreover, the Lockport proposal would result in a fifth service to more than 2,500 people who currently receive

only four services. No such benefits at all would be realized from the Amherst proposal.

10. During the late 1980s, the Commission encountered a series of efforts by various applicants seeking authorizations adjacent to major metropolitan areas, even though the channels involved could be utilized in other, less populated, areas. The Commission resisted these efforts to shift broadcast allotments toward congested population centers. E.g., Modification of FM and TV Authorizations, supra. Unfortunately, the R&O in the instant case reflects precisely the type of "blind[]" or "inflexible application" of criteria which the Commission has expressly stated it would avoid. The Commission can and should recognize that the allotment of Channel 221A to Amherst, rather than to Lockport, would run flatly contrary to that philosophy, which itself is borne of the statutory dictates of Section 307(b). For the reasons stated above, the Commission should reconsider the R&O and should allot Channel 221A to Lockport.

Respectfully submitted,

Ann C. Farhat

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January 5, 1998

CERTIFICATE OF SERVICE

I, Simone Parrish, a legal assistant with Bechtel & Cole, Chatered, hereby certify that, on this 5th day of January, 1998, I caused a copy of the foregoing Petition for Reconsideration to be served on the following parties by United States Postal Service first-class mail, postage pre-paid.

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